INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/14/21

In the Matter of

BEAR CREEK MINING CORPORATION

Claimant,

v.

THE REPUBLIC OF PERU

Respondent.

CLAIMANT'S REPLY POST-HEARING BRIEF

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Per Procedural Order No. 10, Claimant submits this Reply Post-Hearing Brief.

I. SUPREME DECREE 032

A. PERU ADOPTED SUPREME DECREE 032 IN VIOLATION OF BEAR CREEK'S DUE PROCESS RIGHTS

1. The testimony of Respondent's own witnesses best summarizes Peru's due process violations in issuing Supreme Decree 032. Following a series of meetings to which Bear Creek was not invited, Peruvian officials claim to have seen unidentified "documents" showing a "possible" constitutional violation.[1] Peru never made copies of these "documents," never attempted to preserve the originals, never verified their authenticity, never requested an explanation from Bear Creek,[2] and never analyzed the reasons for expropriating Bear Creek's investment.[3] Rather, based on a hurried—at best—legal analysis by a Government lawyer who never saw these "documents," 15-19 Ministers on the Council of Ministers and the President of Peru approved the revocation of Supreme Decree 083 in the dead of night.[4] In a matter of hours, someone drafted Supreme Decree 032, and the expropriation of Bear Creek's investment without compensation was complete.[5]

2. Confronted with this damning evidence, Peru concocts a list of flimsy excuses in its First Post-Hearing Brief ("PHB") that cannot possibly justify its conduct. First, Peru's claim

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1 **Tr.** 776:9-14, 769:15-19, 772:9-16, 810:12-811:1, 846:5-8 (Gala); **RWS-5**, Second Witness Statement of Fernando Gala, Apr. 4, 2016, ¶¶ 4, 5, 14, 19, 21, 23, 25, 27 ("Second Gala Statement"); **Exhibit C-197**, *Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería*, Pontifica Universidad Católica del Perú, Nov. 18, 2013, p. 114; **RWS-7**, Second Witness Statement of César Zegarra, Apr. 8, 2016, ¶¶ 15, 18, 20, 21 ("Second Zegarra Statement").

2 **Tr**. 777:14-778:8, 779:3-8, 794:12-20, 798:6-799:1, 824:8-825:4, 836:6-837:18 (Gala); **Tr.** 979:22-981:10, 990:10-991:7 (Zegarra).

3 *See* Claimant's Post-Hearing Brief, Dec. 21, 2016, ¶ 59 ("Claimant's First PHB"); **Tr.** 777:14-778:8, 779:1-8, 794:12-20, 798:6-799:1, 824:8-825:4, 836:6-837:18 (Gala); **Tr.** 979:22-981:10, 990:10-991:7 (Zegarra).

4 **Tr.** 978:19-980:8, 994:8-11, 1025:11-19 (Zegarra); **Tr.** 837:2-838:3 (Gala).

5 **Tr.** 837:2-838:3 (Gala); **Tr.** 999:19-1001:2 (Zegarra).

that there was no time or reason to "conduct extensive diligence"[6] misses the point entirely. Peru did not conduct **any** diligence, not even a phone call or email to Bear Creek's representatives, **with whom Mr. Gala had met the day before**. Even the "quick" oral legal advice Peru received from Mr. Zegarra about a "possible" constitutional violation was not based on a review of the "documents." Although Peru asserts that Mr. Zegarra "saw the documents at the meetings in Lima,"[7] this is a flagrant misstatement of his testimony: Mr. Zegarra confirmed repeatedly that he never had the documents in his possession and that he never personally reviewed them.[8]

3. Second, even if (as Respondent argues) "under Peruvian law the government was under no obligation to [consult Bear Creek]" before enacting Supreme Decree 032,[9] domestic law cannot excuse a rank international law violation.[10]

4. Third and finally, Respondent's argument that its international law breaches are irrelevant because the information it allegedly obtained on June 23, 2011 "turned out to be entirely accurate" is without merit.[11] That information was that Ms. Villavicencio was Bear Creek's legal representative and employee and that Bear Creek paid concession fees on her behalf and entered into an option agreement with her—information the Government knew when

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6 Respondent's First Post-Hearing Brief, Dec. 21, 2016, ¶¶ 85-87 ("Respondent's First PHB").

7 Respondent's First PHB, ¶ 85.

8 **Tr.** 977:19-21 (Zegarra) ("Q. Now, Mr. Zegarra, did you personally look at these documents that were presented at the meeting? A. Not that I recall."); **Tr.** 1011:16-19 (Zegarra) ("Q. … Is it your testimony that you did not make sure to secure a copy of these documents on which your recommendation, your legal advice was based? A. I never had the documents in my power.").

It is also not credible that there was "no time" to conduct any investigation. According to Mr. Zegarra, people were stepping in and out of the meetings constantly. **Tr.** 972:7-974:9. There was ample opportunity for one of the many Government officials in attendance to find a few minutes to place a phone call to Bear Creek before issuing Supreme Decree 032. That omission is particularly flagrant when compared to what Peru did find time to do: contact 15 to 19 Ministers, have these Ministers deliberate on and agree to the revocation of Supreme Decree 083, obtain approval of the President of Peru, and draft a supreme decree to that effect.

9 Respondent's First PHB, ¶ 117.

10 **CL-40**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶¶ 119-120.

11 Respondent's First PHB, ¶ 86.

it granted Bear Creek's application for a declaration of public necessity.[12] Peru has not shown, and indeed cannot show, that Claimant's acquisition of the Santa Ana Concessions was in any way contrary to Peruvian law (it is also similar to the manner in which other foreign investors acquired mining concessions, which Peru never challenged).[13] And in any event, a party cannot benefit from its own unlawful conduct simply because the alleged basis for its conduct turned out to be true.[14]

B. SUPREME DECREE 032 ON ITS FACE VIOLATES DUE PROCESS

5. As Mr. Zegarra testified, a decision regarding public necessity is an act of State that must comply with the requirements of due process, *i.e.*, it must be clearly reasoned.[15] Supreme Decree 032, however, does not pass muster. The only justification for Article 1 of Supreme Decree 032 (which repealed Supreme Decree 083) is that "[c]ircumstances have been made known that would imply the disappearance of the legally required conditions for the issuance of [Supreme Decree 083.]"[16] This is neither a clear nor a reasoned decision, and thus

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[12] **Exhibit C-17**, Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (*hereinafter*, "Supreme Decree Application"), pp. 83-84; Claimant's Rejoinder on Jurisdiction, May 26, 2016, ¶ 60 ("Claimant's Rejoinder") (citing **Exhibit C-283**, Letter from A. Swarthout, Bear Creek, to Ministry of Labor and Social Welfare dated Jun. 16, 2002 requesting approval of the attached Fixed Term Labor Contract dated Jun. 2, 2002; **Exhibit C-284**, Fixed Term Labor Contract dated Jan. 2, 2003; **Exhibit C-285**, Letter from A. Swarthout, Bear Creek, to Ministry of Labor and Social Welfare dated Jul. 2, 2003 requesting approval of the attached Fixed Term Labor Contract dated Jul. 2, 2003; **Exhibit C-286**, Fixed Term Labor Contract dated Mar. 5, 2004.). *See also infra* ¶ 11.

[13] *See* Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction, Jan. 8, 2016, ¶¶ 54-58, 60-64 ("Claimant's Reply"); Claimant's Rejoinder, ¶¶ 39, 57-58.

[14] **CL-137**, *Amco Asia Corp. I v. Indonesia*, ICSID Case No. ARB/81/1, Award, Nov. 21, 1984, ¶ 242 (*Amco I* Award") (finding that "the mere lack of due process would have been **an insuperable obstacle to the lawfulness** of the revocation" (emphasis added)).

[15] **Tr.** 955:13-956:1 (Zegarra) ("A. And, in your view, a decision regarding public necessity should be reasoned; right? A. Correct just as a general one must be reasoned. Q. And it should be reasoned whether or not there is a finding of public necessity? A. Yes. And that **the State should give the reasons for its decision clearly**; correct? A. **Yes**, as a general rule, that's what should happen." (emphasis added)); **Tr.** 956:2-22, 957:1-7 (Zegarra) ("Q. So, if a State is exercising its discretionary power to revoke a Public Necessity Declaration, it should give its reasons clearly; correct? A. Correct. Q. Because that's what due process requires; correct? A. Correct.").

[16] **Exhibit C-5**, Supreme Decree No. 032-2011-EM, Jun. 25, 2011.

violates due process per Mr. Zegarra's own testimony.[17]

6. Peru now contorts the language of Supreme Decree 032 and claims that the words "new circumstances" refer to the "possible" constitutional violation, while the decree's invocation of the Executive Power to issue decrees "for the purpose of safeguarding the environmental and social conditions" refers to the social protests.[18] The very fact that Peru is forced to extrapolate and interpret the reasons for Supreme Decree 032 undermines its position that these reasons were stated "clearly," and shows, instead, a blatant lack of transparency.

7. In fact, according to Peru's own witness, Vice-Minister Gala, Peru purposefully decided not to state its reasons because it considered that doing so would be "hazardous at the time."[19] Mr. Zegarra also confirmed that (i) Supreme Decree 032 "doesn't explicitly state" what the "new circumstances are," (ii) "no mention is made" of the social protests, and (iii) "if you're not part of the Council of Ministers, you're not privy" to the facts and circumstances underlying Supreme Decree 032.[20] And Peru's constitutional court held that it is "true [that] Supreme Decree No. 032-2011-EM does not specify which circumstances were made known[.]"[21]

C. SUPREME DECREE 032 LACKS ANY FOUNDATION IN FACT OR LAW

1. The Evidence Does Not Support Either Professed Reason for Supreme Decree 032

8. The facts that have come to light in this arbitration do not support either of Peru's alleged bases for enacting Supreme Decree 032. As already briefed,[22] Bear Creek did not engage in a scheme to violate Article 71 of the Constitution, and did not, in fact, breach Peruvian law.

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17 **Tr.** 956:2-22, 957:1-7 (Zegarra).

18 Respondent's First PHB, ¶ 81 (internal quotation marks omitted).

19 **Tr.** 863:13-15 (Gala).

20 **Tr.** 1003:15-1004:20 (Zegarra).

21 *See* **Exhibit C-6**, Amparo Decision No. 28 issued by the Lima First Constitutional Court, May 12, 2014, p. 16.

22 *See* Claimant's Reply, § III.A.1; Claimant's Rejoinder, § II.

Nor did Bear Creek in any way cause the social protests.[23] Since Claimant has already set forth its position and addressed Peru's arguments at length elsewhere,[24] Claimant will focus only on certain misstatements and new arguments raised for the first time in Respondent's First PHB.

9. **Article 71**. Peru claims that Mr. Swarthout "acknowledged repeatedly in cross-examination during the hearing that [Ms. Villavicencio] had no independent role in or even knowledge of the Project's development."[25] Peru then cites to Mr. Swarthout's testimony, which says precisely **the opposite**, namely that Ms. Villavicencio (i) was kept "**fully informed**" by Bear Creek, (ii) was "**present in the office**," (iii) "**worked with the geologist…with the engineer**," and (iv) "**worked with the social community and social relations people**, frankly, **on a daily basis** on all of the projects, not just Santa Ana."[26] Contrary to Respondent's gross misstatement of his testimony, Mr. Swarthout confirmed that Ms. Villavicencio "**was well informed** and **had ample opportunity and experience to make comments**, and **actually asked questions on occasion about certain decisions being made**."[27]

10. Peru also raises a related—but new—argument in its First PHB: when Ms. Villavicencio applied for and acquired the Santa Ana Concessions, Bear Creek should have filled out the bottom half of a form (Annex III.B of Supreme Decree No. 162-92) on the indirect acquisition of mining concessions in the border area, disclosing its relationship to Ms. Villavicencio.[28] But Peru's very premise is wrong. **Bear Creek did not indirectly acquire the Santa Ana Concessions when they were granted to Ms. Villavicencio. Bear Creek directly**

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[23] *See* Claimant's First PHB, ¶¶ 24-26, 71-73.

[24] Claimant's Reply, §§ II.B, II.C; Claimant's First PHB, § III.

[25] Respondent's First PHB, ¶ 86.

[26] **Tr.** 413:2-8 (Swarthout) (cited in Respondent's First PHB, ¶ 86, n. 175) (emphasis added).

[27] *Id.* (emphasis added).

[28] Respondent's First PHB, ¶ 64.

acquired them from her only after Peru enacted Supreme Decree 083 and Bear Creek exercised its option under the Option Agreements. Thus, Bear Creek correctly filled out the top half of the form (Annex III.A) on the direct acquisition of mining concessions in the border area. Annex III.B was simply not applicable.

11. In all events, Bear Creek disclosed its relationship to Ms. Villavicencio. Although Peru repeats its refrain that Bear Creek's only disclosures in its supreme decree application were "scraps of information sprinkled in documents and scattered across the government,"[29] this is patently false. A cursory review of Bear Creek's application revealed to the Government the identity of Bear Creek, the identity of the individual from whom Bear Creek proposed to acquire the Santa Ana Concessions, a copy of the registration of Ms. Villavicencio's power of attorney, her concession applications (including receipts showing that Bear Creek paid her application fees for Karina 5, 6, and 7), and copies of the Option Agreements with proof of their separate registration with the SUNARP registry.[30] Regarding Ms. Villavicencio's employee status, Respondent again conveniently ignores that under international law, the State is a unity, and it therefore knew of that relationship.[31] It would be deeply unjust to hold that Claimant committed fraud for allegedly failing to disclose information the Government already had.[32]

12. Until its First PHB, Peru's allegation of illegality rested on Bear Creek's manner of acquiring the Santa Ana Concessions. Now, Peru claims there was a second illegality that is

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29 Respondent's First PHB, ¶¶ 61, 64.

30 **Exhibit C-17**, Supreme Decree Application, pp. 80 (copy of proof of registration of Ms. Villavicencio's power of attorney), 87-163 (Ms. Villavicencio's concession applications, including copies of checks showing that Bear Creek paid Ms. Villavicencio's concession application fees for Karina 5, 6, and 7), 165-87 (copies of registered Option Agreements and proof of registration).

31 Claimant's Rejoinder, ¶ 89; **CL-30**, The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. GAOR 6th Comm., 53rd Sess., U.N. Doc. A/56/10, 2001, Art. 4(1).

32 In all events, a failure to disclose can neither deprive this Tribunal of jurisdiction nor excuse Respondent's breaches of international law, and it also cannot justify denying or reducing the damages to which Bear Creek is entitled. *See* Claimant's First PHB, ¶¶ 50-53.

"[w]orse yet" (**although never raised in Peru's prior pleadings**), namely the misstatement regarding exploration activities in Bear Creek's application for a declaration of public necessity.[33] But Peru acknowledges that Bear Creek's financial records, submitted with its application, show expenditures for exploration costs at Santa Ana.[34] As Mr. Swarthout testified, "in all of the exhibits and anexos that went with [the supreme decree] application were numerous examples of [Bear Creek's] financial statements and other documents where we were—we clearly showed that we had or that exploration had taken place on the property."[35] The misstatement on page 7 of the application was a good faith mistake remedied in the application itself.[36] If Peru had had any concerns regarding exploration activities and expenditures, it would have raised this issue at the time, as was "common" practice in such matters.[37]

13. In all events, preliminary exploration activities began only after the Government—knowing of Bear Creek's involvement—granted Ms. Villavicencio an exploration permit.[38] In 2008, the Peruvian Ministry of Energy and Mines ("MINEM") transferred the exploration permit to Bear Creek, with knowledge of Bear Creek's involvement in the 2006-2007 exploration activities and of the language in Bear Creek's application (which it approved).[39]

14. **The social protests.** While Respondent argues at length that Bear Creek was at fault for the social protests, it fails to produce any actual evidence supporting its position.

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[33] Respondent's First PHB, ¶ 61.

[34] Respondent's First PHB, ¶ 66.

[35] **Tr.** 408:14-18 (Swarthout).

[36] **Tr.** 408:8-13 (Swarthout). As explained during closing argument, a good faith mistake or a minor illegality does not defeat the Tribunal's jurisdiction or relieve Peru from liability. **Tr.** 1764:17-1771:1 (Claimant); Claimant's Closing PowerPoint Presentation, pp. 46-58; Claimant's First PHB, ¶¶ 50-53.

[37] **Tr.** 964:13-21 (Zegarra); **Tr.** 1015:11-16 (Zegarra).

[38] Claimant's Reply, ¶¶ 31-34; **Exhibit C-287**, J. Karina Villavicencio's Request for the Approval of Mining Exploration Category B Affidavit, Jun. 9, 2006; **Exhibit C-139**, Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006; **Exhibit C-140**, Informe No. 170-2006/MEM-AAM/EA, Jul. 10, 2006; and **Exhibit C-141**, Informe No. 265-2006/MEM-AAM/EA/RC, Oct. 12, 2006.

[39] **Exhibit R-36**, Directorial Resolution No. 216-2008-MEM/AAM Approving First Amendment to the EIA for Exploration for the Santa Ana Project, Sept. 5, 2008.

Respondent's only factual support is that the protesters demanded, among many other things, that the Santa Ana Concessions be canceled. This does not establish a causal link. The decision in *Copper Mesa* provides guidance on the type of conduct that could be held to demonstrate a causal link, *e.g.*, video footage of a private security company hired by the investor marching to the concession area with firearms, tear gas, bombs, and bullet-proof vests, and causing a violent confrontation with anti-mining protesters; documentary evidence showing bribes paid to community members in exchange for their support; and admissions by the investor's own witnesses.[40] There is no such evidence in the record of this arbitration.

2. Neither the Alleged "Possible" Article 71 Violation nor the Social Protests Were Alone Sufficient to Justify Supreme Decree 032

15. According to Peru, "it is clear that … the government was entitled under Peruvian law to repeal the declaration of public necessity on the basis of either one of these events [*i.e.*, the alleged 'possible' constitutional violation and the social unrest] standing alone."[41] Contrary to Respondent's position, however, even assuming *arguendo* that Bear Creek had violated Article 71 (which it did not) and that it had caused the social protests (which it did not), neither reason can justify the unlawful expropriation of Bear Creek's investment.

16. The circumstances of Peru's alleged discovery of the mystery documents remain utterly incredulous.[42] But more importantly, when Peru enacted Supreme Decree 032, it had evidence only of a "possible" constitutional violation, nothing more.[43] Mere allegations of illegality and a belief that there may have been a violation of Peruvian law cannot justify the

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[40] **CL-237**, *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, Mar. 15, 2016, ¶¶ 4.105, 4.173, 4.179-90, 4.214-230, 4.251, 4.286 ("*Copper Mesa* Award").

[41] Respondent's First PHB, ¶ 91.

[42] *See supra* ¶ 1.

[43] Respondent's First PHB, ¶ 87; **RWS-5**, Second Gala Statement, ¶¶ 4, 5, 14, 19, 21, 23, 25, 27; **Tr.** 769:15-19, 772:9-16, 846:5-8 (Gala); **Exhibit C-197**, *Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería*, Pontifica Universidad Católica del Perú, Nov. 18, 2013, p. 114; **RWS-7**, Second Zegarra Statement, ¶¶ 15, 18, 20, 21.

unlawful expropriation of a multi-million dollar investment.

17. It is also clear that the social protests could not justify Supreme Decree 032. As Dr. Bullard explained, "social discontent does not invalidate in any way the declaration of public necessity based on which S.D. 083-2007-EM was issued,"[44] and there "is no special provision in the entire Peruvian legal system that authorizes the revocation of a concession or stripping someone from their property as a result of the population's social dissatisfaction."[45] In fact, no supreme decree had ever been revoked before for this reason.[46] As previously detailed, Respondent's witnesses and the Peruvian State (outside of this arbitration) agree, and at the time considered the protesters' demands to cancel concessions to be unlawful.[47]

18. Finally, as Dr. Flury testified, "[e]very expropriation under [Peru's] legislation, regardless of the location or the site, requires legislation and corresponding compensation."[48] Article 70 of the Peruvian Constitution confirms Dr. Flury's testimony.[49] By definition therefore, Peru's Supreme Decree 032, which expropriated Claimant's investment without compensation and without a law passed by Congress, was unlawful.

II. THE APPLICABLE REGULATORY FRAMEWORK

A. RESPONDENT MISCHARACTERIZES THE IMPORT OF ILO CONVENTION 169

19. Peru claims that three international instruments inform the relevant standard by

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44 Expert Report of Professor Alfredo Bullard, May 26, 2015, ¶ 182.

45 *Id.*, ¶ 186.

46 Claimant's First PHB, ¶ 70.

47 *Id.*, ¶ 35 (*citing* **Exhibit C-236**, "*The dialogue will prevail in Puno*," EL PERUANO, May 27, 2011; **Exhibit C-93**, "*Community members demand a statement from the PCM*," LA REPÚBLICA, May 19, 2011; **Exhibit C-95**, "*Dialogue in Puno did not succeed due to intransigence of the leaders*," MINEM Press Release, May 26, 2011; **Exhibit C-96**, "*MEM: Executive still open to dialogue with the people of Puno*," RPP Noticias, May 27, 2011; **Exhibit C-97**, Interview of Prime Minister Rosario Fernández, MIRA QUIEN HABLA, WILLAX TV, May 31, 2011; **Tr.** 864:14-17, 887:16-21 (Gala)).

48 **Tr.** 1231:5-7 (Flury).

49 **Exhibit R-1**, Peruvian Constitution, Art. 70 (providing that the State guarantees the right to private property, and that any expropriation must be effected through legislation and accompanied by compensation).

which to judge Bear Creek's outreach efforts, and that this standard is one of "success." Prior to its first PHB, Peru had never referred to two of these instruments, which the Tribunal excluded from the record per its Order of December 29, 2016.

20. According to Peru, the most important instrument is ILO Convention No. 169,[50] which it quotes misleadingly while misrepresenting how the Convention functions. In quoting portions of Article 6 on the indigenous communities' right to be consulted, Article 13 on the meaning of "territories," and Article 15 on the communities' right to participate in the use, management and conservation of the natural resources located within their lands,[51] Peru carefully scrubs them clean of key language that reveals unambiguously that these obligations are imposed on States, not private companies.[52] In quoting Article 6, for example, Peru states that "[c]onsultations shall be with 'all the peoples concerned, through appropriate procedures…,'"[53] but intentionally omits the language immediately preceding the quoted portion, which provides that "[i]n applying the provisions of this Convention, **governments shall** consult the peoples concerned…"[54] This language clarifies that the obligations of Article 6 are directed to States, as are all provisions of ILO Convention 169.

21. Respondent proceeds to list various features that community consultations should

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50 Respondent's First PHB, ¶ 20.

51 *Id.*

52 Peru accepts its responsibility under ILO Convention 169 only with respect to Article 15 regarding the Government's obligation to maintain procedures to consult the concerned communities. Peru claims that it adopted such procedures, but then later claims that Bear Creek's "mere compliance" with these procedures was not enough to satisfy Bear Creek's consultation requirements. Peru cannot have its cake and eat it too; it cannot claim on the one hand that it implemented ILO Convention 169 and then say that compliance with the procedures that implemented the Convention does not meet ILO Convention 169 standards.

53 Respondent's First PHB, ¶ 20 (citing ILO Convention 169, Article 6).

54 **Exhibit R-29**, International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), Sept. 5, 1991 ("ILO Convention 169"), Art. 6 (emphasis added). Respondent also misquotes the text of Art. 6, adding the word "all" before peoples, *i.e.*, "Consultations shall be with '**all** the peoples concerned'" (Respondent's First PHB, ¶ 20 (citing ILO Convention 169) (emphasis added)), but the Convention simply states: "In applying the provisions of this Convention, **governments shall**: (a) consult the peoples concerned…."

have in order to comply with ILO Convention 169, and claims that Bear Creek "failed to comply with each of these requirements[.]"[55] However, the Convention is binding and imposes **direct obligations only on States**.[56] Private companies like Bear Creek cannot "fail to comply" with ILO Convention 169 because it does not impose direct obligations on them.

22. ILO Convention 169 also does not support Respondent's claim that a company's community consultations are sufficient only if they succeed. The Convention adopts principles guiding **how** community consultations should be undertaken. It does not impose an obligation of result. This is evident from the plain text of the Convention. Article 6.2 states that consultations shall be carried out "in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measure[.]"[57] But the Convention (like Peruvian law[58]) does not grant communities a veto power, should good faith consultations fail to result in agreement of all parties concerned.[59] The only relevant inquiry is whether the consultations were in good faith, adjusted to the circumstances of the project and the affected community, and conducted with the objective of reaching agreement.

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55 Respondent's First PHB, ¶ 21.

56 **Exhibit R-29**, ILO Convention 169, Art. 33 ("The governmental authority responsible for the matters covered in this Convention shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfilment of the functions assigned to them. These programmes shall include: (a) the planning, coordination, execution and evaluation, in cooperation with the peoples concerned, of the measures provided for in this Convention").

57 *Id.*, Art. 6.2.

58 **Exhibit R-159**, Regulation on Citizen Participation in the Mining Subsector, Supreme Decree No. 028-2008-EM, May 26, 2008, Art. 4 ("Supreme Decree No. 028").

59 **Exhibit R-29,** ILO Convention, Art. 15 states that "In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments **shall establish or maintain procedures through which they shall consult these peoples**, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall **wherever possible** participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities." (emphasis added) This provision requires procedures for consultations but does not provide that affected communities have veto rights should they disapprove of a particular project.

B. PERUVIAN LAW INCORPORATES AND IMPLEMENTS ILO CONVENTION 169 INTO ITS LEGAL SYSTEM

23. Under ILO Convention 169, Peru has "the responsibility for developing, with the participation of the peoples concerned, coordinated and systemic action to protect the rights of [indigenous] peoples and to guarantee respect for their integrity."[60] Such action includes the implementation of a domestic legal framework that gives effect to Peru's obligations under ILO Convention 169.[61] In other words, Peru—not Bear Creek—is obligated to implement the provisions of ILO Convention 169 by enacting domestic legislation that outlines how Peruvian natural and legal persons should act in order for Peru to respect its international law obligations.

24. Respondent acknowledged that Peruvian law incorporated ILO Convention 169.[62] However, it failed to explain that the Regulation on Citizen Participation in the Mining Subsector ("Supreme Decree No. 028")—which Peru recognized as one of two principal legal norms governing the Citizen Participation Process in the context of a mining project[63]—specifically implemented and regulated Peru's obligations under ILO Convention 169.[64] In fact, Supreme Decree No. 028 confers on Respondent the responsibility of guaranteeing the right to citizen participation in order to ensure that its ILO Convention 169 obligations are satisfied.[65]

25. Pursuant to Supreme Decree No. 028, MINEM's General Directorate for Environmental Mining Affairs (*Dirección General de Asuntos Ambientales Mineros* or

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60 *Id.*, Art. 2.

61 *Id.*, Art. 33(2)(b) ("These programmes shall include: (b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in cooperation with the peoples concerned.").

62 Respondent's First PHB, ¶¶ 20, 27.

63 *Id.*, ¶ 28. *See also* Claimant's First PHB, ¶ 2.

64 *See* Claimant's First PHB, ¶ 2; **Exhibit R-159**, Supreme Decree No. 028, Art. 4 ("The **right to consultation referred to in Convention 169** of the International Labor Organization on Indigenous and Tribal Populations in Independent Countries **is exercised and implemented** in the mining subsector **through the citizen participation process regulated by these Regulations**") (emphasis added).

65 *See* Claimant's First PHB, ¶ 3; **Exhibit R-159**, Supreme Decree No. 028, Art. 3.

"DGAAM") is responsible for guiding, directing, and conducting the Citizen Participation Process.[66] In that capacity, it reviews and selects the most suitable citizen participation mechanisms among those proposed by the mining company, and it is empowered to adopt all necessary measures to ensure that such mechanisms are successful.[67] Ministerial Resolution No. 304-2008-MEM/DM Regulating the Citizen Participation Process in the Mining Subsector ("Resolution No. 304"), the other principal legal norm governing the Citizen Participation Process in the context of a mining project,[68] further develops the citizen participation mechanisms referenced in Supreme Decree No. 028 by identifying specific activities and criteria to guarantee the effectiveness of the communities' participation rights.[69]

III. BOTH THE LOCAL COMMUNITIES AND PERU ENDORSED BEAR CREEK'S COMMUNITY RELATIONS PROGRAM FOR THE SANTA ANA PROJECT

A. DGAAM APPROVED BEAR CREEK'S CITIZEN PARTICIPATION PLAN

26. On December 23, 2010, Bear Creek submitted its Citizen Participation Plan ("PPC") to DGAAM. Bear Creek's PPC set out various citizen participation mechanisms that it proposed to implement during the evaluation of the Santa Ana Project's Environmental and Social Impact Assessment ("ESIA") for the exploitation phase, and during the execution of the Project itself.[70] Bear Creek's PPC also delineated the Project's areas of direct and indirect influence.[71] DGAAM approved Bear Creek's PPC on January 7, 2011, noting that the citizen participation mechanisms proposed by Bear Creek were "appropriate to the particular characteristics of the mining activity area of influence, of the project and its magnitude and the

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66 *See* Claimant's First PHB, ¶ 3; **Exhibit R-159**, Supreme Decree No. 028, Art. 2.2.

67 *See* Claimant's First PHB, ¶¶ 3, 5; **Exhibit R-159**, Supreme Decree No. 028, Arts. 7, 17.

68 *See* Respondent's First PHB, ¶ 28; Claimant's First PHB, ¶ 2.

69 *See* Claimant's First PHB, ¶ 4; **Exhibit R-153**, Ministerial Resolution No. 304-2008-MEM-DM Regulating the Citizen Participation Process in the Mining Subsector, Jun. 24, 2008, Art. 1 ("Resolution No. 304").

70 *See* Claimant's First PHB, ¶ 12; **Exhibit C-155**, Ausenco Vector, *Plan de Participación Ciudadana* ("PPC").

71 *See* Claimant's First PHB, ¶¶ 12-13.

relevant population in accordance with Article 6 of Supreme Decree No. 028."[72]

27. Peru's endorsement of Bear Creek's PPC is a crucial fact in this case. It means that the citizen participation mechanisms that Bear Creek proposed—and that it implemented in the first months of 2011 after DGAAM approved its PPC—complied with both Supreme Decree No. 028 and Resolution No. 304, and consequently with Peru's obligations under ILO Convention 169. Peru would not have approved Bear Creek's PPC otherwise.

28. Bear Creek regularly informed DGAAM of the different citizen participation mechanisms that it implemented pursuant to the PPC.[73] In light of its responsibility to guide, direct, and conduct the Citizen Participation Process according to Supreme Decree No. 028, Peru was entitled to comment on or criticize Bear Creek's implementation of these mechanisms. Yet, despite Mr. Ramirez Delpino's admission that Bear Creek kept DGAAM informed about their implementation,[74] Peru never intervened.[75]

29. Leading up to its approval of Bear Creek's PPC, DGAAM endorsed Claimant's community outreach efforts by approving three amendments to the ESIA for the Project's exploration phase in 2008, 2009, and 2010.[76] During that period, Bear Creek conducted over

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[72] *Id.*, ¶ 16; **Exhibit C-161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011, pp. 2-4, items 15.2 and 15.3; Claimant's Closing Statement, Sept. 14, 2016, Slide 86.

[73] *See* Claimant's First PHB, ¶¶ 17, 22 (citing **Exhibit C-162**, Letter from Bear Creek to DGAAM, Jan. 21, 2011; **Exhibit C-187**, Letter from Bear Creek to DGAAM, Feb. 1, 2011; **Exhibit C-188**, Letter from Bear Creek to DGAAM, Mar. 1, 2011; **Exhibit C-189**, Letter from Bear Creek to DGAAM, Apr. 1, 2011; and **Exhibit C-190**, Letter from Bear Creek to DGAAM, May 3, 2011).

[74] **Tr.** 1111:12-16 (Ramírez Delpino).

[75] **Tr.** 571:8-12 (Antúnez de Mayolo) ("One last question: Prior to the enactment of Supreme Decree 032, did the Peruvian Government ever advise Bear Creek that the execution of its citizen-participation mechanisms was inadequate? A. Never. We were never told anything.").

[76] *See* Claimant's First PHB, ¶ 8; **Exhibit R-36**, Directorial Resolution No. 216-2008-MEM/AAM Approving First Amendment to the EIA for Exploration for the Santa Ana Project, Sept. 5, 2008; **Exhibit R-37**, Directorial Resolution No. 310-2009-MEM/AAM Approving Second Amendment to the EIA for Exploration for the Santa Ana Project, Oct. 6, 2009, p. 13; **Exhibit R-38**, Directorial Resolution No. 280-2010-MEM/AAM Approving Third Amendment to the EIA for Exploration for the Santa Ana Project, Sept. 8, 2010, p. 15.

130 workshops in a total of 18 communities within the direct and indirect areas of influence,[77] many of which were chaired by either the Regional Directorate of Energy and Mines ("DREM") at MINEM's request or the local authorities at DREM's direction.[78] Neither MINEM nor DREM ever informed Bear Creek of any concerns they may have had regarding these workshops or other community-related matters.[79] In fact, Mr. Ramírez Delpino, who personally signed the resolutions approving the 2009 and 2010 amendments to Bear Creek's exploration ESIA, acknowledged that "Bear Creek got past all the steps of the exploration stage."[80]

30. The contemporaneous evidence thus demonstrates that, prior to Respondent's unlawful enactment of Supreme Decree 032, **the Peruvian government supervised and endorsed Bear Creek's community relations program for the Santa Ana Project every step of the way**. Yet in this arbitration, Peru has tried to distance itself from these indisputable facts by denigrating Bear Creek's community outreach efforts. These recently-concocted *ex post facto* criticisms are baseless and were never shared with Bear Creek at the time.

31. First, Peru alleges that Bear Creek worked with only 5 of the 26 communities that it had identified in its December 2006 supreme decree application and that, as a result, Bear Creek's community relations program did not include all relevant stakeholders.[81] That claim is false, as Bear Creek worked with 18 communities within the Project's direct and indirect areas of influence,[82] and held meetings with national, regional, and local authorities to familiarize all

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77 *See* Claimant's First PHB, ¶ 14; **Exhibit R-229**, 2010 Environmental Impact Assessment (PPC), Annex 2: Participatory Information Workshops 2007-2010, Dec. 23, 2010.

78 *See* Claimant's First PHB, ¶ 9; **Exhibit C-0159**, Letter from F. Ramírez, MINEM, to V. Paredes, DREM, Oct. 28, 2010; **Exhibit R-230**, 2010 Environmental Impact Assessment (PPC), Annex 3: EIA Opening Workshop Minutes, Dec. 23, 2010; **Exhibit R-231**, 2010 Environmental Impact Assessment (PPC), Annex 4: Information Workshop Minutes, Dec. 23, 2010; Claimant's Closing Statement, Sept. 14, 2016, Slide 95.

79 *See* Claimant's First PHB, ¶ 9; **Tr.** 1090:4-7 (Ramírez Delpino).

80 *See* Claimant's First PHB, ¶ 8; **RWS-2**, Witness Statement of Felipe A. Ramírez Delpino, Oct. 6, 2015, ¶ 8.

81 Respondent's First PHB, ¶ 39.

82 *See supra* ¶ 29.

stakeholders with the Project.[83] Respondent's claim is also misleading because under Peruvian law, a supreme decree application does not officially delimit a mining project's areas of influence.[84] Bear Creek noted in its application that it would identify definitively Santa Ana's areas of influence at a later stage.[85] It did so in its PPC, which Peru approved.[86]

32. Second, Respondent criticizes Bear Creek for allegedly including the entire Department of Puno in the Project's area of indirect influence.[87] Peru's objection is groundless. As set forth in Bear Creek's PPC, the Project's area of indirect influence covered the districts of Huacullani and Kelluyo only.[88] It is also clear that DGAAM was well aware of this fact: on April 19, 2011, when DGAAM sent its observations to Bear Creek on its ESIA for the Project's exploitation phase, it noted that "[i]s considered as an Area of Indirect Influence (AII) the district of Huacullani, the district of Kelluyo, province of Chucuito."[89]

33. Third, Respondent accuses Bear Creek of failing to carry out consultations with the communities "in a climate of mutual trust" by not providing them with all relevant information.[90] In support of its claim, Peru refers only to the meeting minutes of four workshops that Bear Creek conducted in August 2009.[91] However, these four meeting minutes simply

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83 *See* Claimant's First PHB, ¶ 14.

84 *See* Second Expert Report of Professor Alfredo Bullard, Jan. 6, 2016, ¶ 18 ("Second Bullard Expert Report"); **Exhibit Bullard 034**, Texto Único de Procedimientos Administrativos del Ministerio de Energía y Minas. The regulation provides that a company must include in its application a brief description of the mining project, but does not require an official delimitation of the project's direct and indirect areas of influence.

85 *See* **Exhibit C-17**, Supreme Decree Application, p. 19 ("it is necessary to clarify, if need be that once Bear Creek's application is approved for the acquisition of the mining rights for the Santa Ana Mining Project, Bear Creek would initiate a process to clearly identify the communities that would effectively benefit from the development of the Santa Ana Project.").

86 *See supra* ¶ 26.

87 Respondent's First PHB, ¶ 39.

88 *See* Claimant's First PHB, ¶ 13.

89 **Exhibit R-40**, DGAAM's Observations to Bear Creek's EIA for Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD, Apr. 19, 2011, p. 7.

90 Respondent's First PHB, ¶¶ 38, 42.

91 Respondent's First PHB, ¶ 42, n. 84 to n. 89. *See also* **Exhibit C-155**, PPC, Annex III, pp. 1-2 (Workshop

contain requests that Bear Creek carry out more workshops,[92] which is precisely what it did. Following these four workshops, Bear Creek conducted 85 additional workshops in these communities and others located in the areas of direct and indirect influence.[93] As for Peru's allegation that Bear Creek was not "upfront" with the communities about its role at the start of the Project,[94] it is both untrue and irrelevant.[95] As Mr. Ramírez Delpino testified, communities care more about a mining project's size than about the identity of its owners.[96]

34. Finally, Peru argues that Bear Creek did not understand the Aymaras' community organization and collective decision-making processes,[97] and did not grant enough time to allow the communities to engage in these processes.[98] But these claims are based on the testimony of Dr. Peña who—both parties agree—has no contemporaneous knowledge of the relevant events of this case. Dr. Peña's reports are based on statements he supposedly obtained by traveling to Huacullani and Kelluyo and allegedly interviewing various community members.[99] However, Dr. Peña did not identify any of the interviewees nor did he disclose anonymized transcripts of the interviews that he claims to have conducted.[100] The Tribunal should place no weight on

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conducted in the Huacullani municipality on August 7, 2009), 24-25 (Workshop conducted in the Challacollo community on August 8, 2009), 52-53 (Workshop conducted in the Ancomarca community on August 9, 2009), and 69-70 (Workshop conducted in the Huacullani municipality on August 13, 2009).

92 **Exhibit C-155**, PPC, Annex III, pp. 2, 25, 53, 70.

93 *See* **Exhibit C-155**, PPC, Table 5.3, Meetings and Community Participation, p. 14; and **Exhibit C-155**, PPC, Annex II, pp. 1-2, 6-8. Bear Creek conducted 17 workshops from September to December 2009, and 68 workshops in 2010.

94 Respondent's First PHB, ¶ 38.

95 *See* Claimant's Reply, ¶ 30.

96 **Tr.** 1075:17-1076:6 (Ramírez Delpino) ("Arbitrator Sands: In relation to your professional experience –I'm only asking about your experience in these matters – would it make a difference for the consultees in the local community as to whether the Company making the proposal is a local company or a local individual, on the one hand, or an outside company, on the other hand, in terms of not a local non-Peruvian? Does it make a difference in terms of the likely reaction to the Project? The Witness: Not necessarily. There's more of an impact on the population's opinion – the population's opinion is shaped more by the magnitude of the Project").

97 Respondent's First PHB, ¶ 40.

98 *Id.*, ¶ 44.

99 **REX-2**, Opinion of Anthropology and Sociology of Law Expert Antonio A. Peña Jumpa, Oct. 6, 2015, ¶¶ 4-5.

100 **Tr.** 1337:21-22, 1341:7-18 (Peña).

Dr. Peña's unsubstantiated testimony and should disregard Peru's allegations based thereon.[101]

B. THE STATE-CHAIRED PUBLIC HEARING WAS A SUCCESS

35. On February 23, 2011, a MINEM attorney, Kristiam Veliz Soto, chaired the public hearing on Bear Creek's Santa Ana Project; the President of DREM, Jesus Obed Alvarez Quispe, and a Special Prosecutor for Environmental Matters, Dr. Alejandro Tapia Gómez, also attended.[102] By all contemporaneous accounts, including MINEM's March 2, 2011 press release,[103] Vice-Minister Gala's *aide-mémoire*,[104] and Mr. Ramírez Delpino's declarations at a May 17, 2011 meeting,[105] the public hearing was successful. Braulio Morales Choquecahua, Faustino Limatapa Musaja, and Sixto Vilcanqui Mamani, all former Huacullani community representatives who attended the public hearing, also confirmed that it had been a success.[106]

36. In this proceeding, however, Peru has ignored the contemporaneous evidence in the record while failing to produce a single witness who attended the public hearing. Instead, Peru has endorsed DHUMA's biased, unsubstantiated, and after-the-fact description of the event,[107] which contradicts Peru's own contemporaneous documents and statements. That is an extraordinary about-face for Peru given that Peru *chaired* the public hearing, two additional State

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[101] Even if the Tribunal were minded to give credence to Dr. Peña's testimony in this arbitration, it contradicts his own previous publications, which placed blame squarely on Peru for the 2011 events in Puno (*see* Claimant's First PHB, ¶ 28; **Exhibit C-232**, Blog Posts of Antonio Alfonso Peña Jumpa). Therefore, Dr. Peña's evidence is incomplete, at the very least, and should not be taken into account.

[102] *See* Claimant's First PHB, ¶ 18; **Exhibit C-76**, Minutes of the Public Hearing, Feb. 23, 2011.

[103] **Exhibit C-328**, MINEM Press Release, Mar. 2, 2011.

[104] **Exhibit R-10**, Aide-Mémoire, "*Actions Done by the Executive Power Regarding Conflicts in the Puno Department*," July 2011, p. 4 ("[Bear Creek] had no problems when it held the public hearing for the [ESIA] of the Santa Ana project in Huacullani on February 23, 2011.").

[105] **Exhibit C-78**, Ricardo Uceda, "*Puno: prueba de fuego*," REVISTA PODER 360°, Jun. 2011, p. 8/10: "Ramírez was saying that the population of Huacullani approved the Santa Ana project. He described the harmonious development of the presentation of the environmental impact study when the whistling and protests started up. "But you were there. You saw it. You too," said Ramírez, speaking to Aduviri and the mayor of Desaguadero, Juan Carlos Aquino."

[106] *See* Claimant's First PHB, ¶ 21; **Exhibit C-329**, Letter from Braulio Morales Choquecahua and Faustino Limatapa Musaja, Aug. 8, 2016; **Exhibit C-331**, Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016.

[107] Respondent's First PHB, ¶¶ 8, 43.

officials attended, Peru issued a press release a few days later recognizing that the public hearing had ended satisfactorily, and two of Peru's witnesses in the arbitration corroborated that characterization *at the time*, describing the public hearing as harmonious and without problems.

37. If Peru truly had been unhappy with the public hearing, it would have ordered Bear Creek to hold additional workshops to clear up any misunderstandings with the communities or alleviate any of their concerns.[108] But Respondent did not do so. Instead, on April 19, 2011, when DGAAM issued its observations to Bear Creek's ESIA for the Project's exploitation phase, it noted that Claimant had implemented all of the citizen participation mechanisms of the ESIA evaluation phase, as set forth in the Peru-approved PPC.[109]

C. BEAR CREEK HAD A SOCIAL LICENSE TO BUILD THE SANTA ANA PROJECT

38. Throughout this arbitration, Respondent has pointed to the protests that began in late April and early May 2011 as "inescapable proof" that Bear Creek allegedly did not have a social license for the Santa Ana Project.[110] But Peru's fallacious argument rests on hindsight that misleadingly interprets the events of 2011 five years after the fact, in complete contradiction of Peru's view at the time. Peru's approach is deeply flawed. To determine whether Bear Creek had a social license, the Tribunal must view the events in light of contemporaneous statements and documents (just as it must with respect to Bear Creek's community relations program and the public hearing). At the time, senior Peruvian government officials, including Vice-Minister Gala and Clara García, principal legal advisor to the Minister of Energy and Mines, stated unequivocally that Bear Creek's Santa Ana Project had a social license.[111]

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[108] *See* Claimant's First PHB, ¶ 18.

[109] *Id.*, ¶ 22; **Exhibit R-40**, DGAAM's Observations to Bear Creek's EIA for Exploitation, Apr. 19, 2011, pp. 2-6.

[110] *See, e.g.*, Respondent's First PHB, ¶ 16.

[111] **Exhibit C-94**, "*Anti-mining strike in Puno still unresolved*," LA REPÚBLICA, May 21, 2011: "The vice-minister reaffirmed that it is not feasible to nullify any concession, and even worse if it is registered in Public Records. He explained that the Santa Ana project complied with all the conditions required by law. He recalled that the

39. As noted above, Peru monitored and approved Bear Creek's community outreach efforts at Santa Ana *every step of the way,* including by endorsing its PPC on January 7, 2011. Likewise, the February 23, 2011 public hearing over which the State presided was successful, and on April 19, 2011, Respondent confirmed that Bear Creek had implemented all of the citizen participation mechanisms that were to be carried out during the ESIA evaluation phase, as set forth in the State-approved PPC.

40. It is against this factual background that on April 22, 2011, according to Vice-Minister Gala's *aide-mémoire*—which is his best recollection of the events leading up to the enactment of Supreme Decree 032[112]—some residents of Southern Puno began to protest against the regional Puno government requesting that it sign ordinances against mining.[113] Then, on May 9, 2011, a strike began in the city of Desaguadero—which is not located in the Santa Ana Project's areas of influence—where local leaders called for the cancellation of the Project and all mining concessions in Southern Puno.[114] Vice-Minister Gala's *aide-mémoire* notes that there had been no protests prior to that time against Bear Creek's activities.[115]

41. The protests were orchestrated for political reasons by Walter Aduviri—a man whom Prime Minister Rosario Fernández described at the time as "a nefarious leader" who "has very bad intentions, deceives people," and "takes advantage of the situation"[116]—and the *Frente*

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company submitted its Environmental Impact Assessment, fulfilling all requirements required by Law. **The project has a social license**" (emphasis added); and **Exhibit C-93**, "*Community members demand a statement from the PCM,*" LA REPÚBLICA, May 19, 2011: "García Hidalgo stated that Santa Ana submitted its EIS [Environmental Impact Study] with all the requirements of the law, **which implies that it has a social license**" (emphasis added).

112 **Tr.** 782:16-19 (Gala) ("Q. Your best recollection of the events is reflected in this Aide Mémoire; is that right? A. Yes, yes. It is the closest to the actual situation.").

113 **Exhibit R-10**, Aide-Mémoire, "*Actions Done by the Executive Power Regarding Conflicts in the Puno Department,*" July 2011, p. 4.

114 *Id.*

115 *Id.*

116 **Exhibit C-97**, Interview of Prime Minister Rosario Fernández, MIRA QUIÉN HABLA, WILLAX TV, May 31, 2011, [03:48] – [05:00] and [05:34] – [07:38].

de Defensa de los Recursos Naturales de la Zona Sur de Puno ("FDRN"), which Ms. Fernández characterized as an extremist organization with political motivations.[117]

42. Not once during the protests did a single Peruvian public official state that the protests delegitimized the Santa Ana Project. From the outset, high-level Peruvian officials proclaimed that the protests were politically motivated and that the protesters' demands were "irrational,"[118] "constitutional nonsense,"[119] "unconstitutional,"[120] and "completely illegal."[121] Prime Minister Fernández confirmed that canceling the concessions in response to the unrest would be "the easiest way out" and would undermine "legal security."[122] Thus, in light of these contemporaneous statements and documents, it is simply false to allege—as Peru now does—that the protests prove that Bear Creek did not have a social license for the Project.

D. PERU CANNOT BENEFIT FROM ITS OWN WRONGDOING

43. Peru alleges that, for Claimant to prevail on the question of whether its outreach was "sufficient," the Tribunal is faced with two options: it must find either that Bear Creek had the social license to develop the Project or that Bear Creek did not need one as long as it complied with the requisite procedural steps under Peruvian law.[123] As established above, Claimant had a social license to build Santa Ana and fully complied with the applicable regulatory framework. However, a third alternative exists whereby the Tribunal could find that, although Bear Creek had not yet obtained the social license to develop the Project, it was

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117 **Exhibit C-92**, Press Release, *Presidencia del Consejo de Ministros, Premier califica de inadmisible bloque de carreteras en Puno y pide deponer acciones violentas*, May 18, 2011.

118 **Exhibit C-236**, "*The dialogue will prevail in Puno*," EL PERUANO, May 27, 2011.

119 *Id.*

120 **Exhibit C-96**, "*MEM: Executive still open to dialogue with the people of Puno*," RPP Noticias, May 27, 2011.

121 **Exhibit C-95**, "*Dialogue in Puno did not succeed due to intransigence of the leaders*," MINEM Press Release, May 26, 2011. *See also* **Tr.** 864:14-17, 887:16-21 (Gala); and **Exhibit C-93**, "*Community members demand a statement from the PCM*," LA REPÚBLICA, May 19, 2011.

122 **Exhibit C-97**, Interview of Prime Minister Rosario Fernández, MIRA QUIEN HABLA, WILLAX TV, May 31, 2011, [31:41] – [32:22].

123 *See, e.g.*, Respondent's First PHB, ¶ 15.

prevented from doing so by Peru's own wrongdoing.

44. When the protests in Southern Puno began in April-May 2011, Peru never gave Bear Creek a chance to continue its community outreach efforts in order to strengthen the social license that it had already obtained. On May 30, 2011, the day before Prime Minister Fernández denounced Aduviri and the FDRN, DGAAM summarily and improperly suspended for a 12-month period the evaluation process of Bear Creek's ESIA for the Project's exploitation phase, without providing any advance notice or due process to Bear Creek.[124] The State's suspension of Bear Creek's ESIA prevented Claimant from continuing to implement its community relations program at Santa Ana. And less than a month later, Peru unlawfully enacted Supreme Decree 032, expropriating Bear Creek's Santa Ana Project.

45. In short, if the Tribunal considers that Bear Creek had not already obtained the social license to develop Santa Ana, then it is Peru's own actions that prevented Bear Creek from obtaining one. Since Peru cannot be allowed to benefit from its own wrongdoing, Bear Creek's inability to obtain a social license—under this scenario—cannot be held against it.

IV. DAMAGES

46. The most appropriate form of "full reparation" in this case is to award Bear Creek: (i) the fair market value ("FMV") of the expropriated Santa Ana Project, measured just prior to the expropriation and without any diminution in value resulting from pre-expropriation unlawful acts and public pronouncements of the imminent expropriation, and (ii) additional damages to the Corani project resulting directly from Peru's unlawful actions against Santa Ana. For purposes of this Reply PHB, and to avoid being duplicative, Bear Creek will address only three broad points raised by Peru in its First PHB, namely, Bear Creek will: *first*, debunk Peru's contention that it owes no damages to Bear Creek because the Santa Ana Project supposedly

[124] **Exhibit C-98**, DGAAM Resolution No. 162-2011-MEM-AAM, May 30, 2011.

would have been unsuccessful; *second*, expose as contrary to international law Peru's argument that a violation of Bear Creek's due process rights does not entitle Bear Creek to receive compensation; and *third*, address Peru's erroneous argument that any compensation should be reduced on comparative-fault grounds.

A. DAMAGES OWED FOR LAWFUL OR UNLAWFUL EXPROPRIATION

47. Peru's strategy throughout the proceedings and at the hearing itself has been to detract attention from its unlawful conduct by any means possible.[125] Its position on damages is no different. In its First PHB, Peru argued that the Santa Ana Project would not have been successful because it lacked a "social license" and therefore Peru "should not face any damages award."[126] Under this scenario, Peru's unlawful conduct becomes irrelevant. In other words, Peru crafted an unprecedented standard that would exempt it wholesale from liability (even in the face of its demonstrated unlawful conduct), render the FTA protections worthless, and be contrary to international law. The Tribunal should not legitimize Peru's misguided argument.

48. By virtue of the FTA, Peru bound itself to pay the FMV of Bear Creek's investment in case Peru carried out a lawful expropriation.[127] The FTA makes no exception—nor does it provide for any reduction in value—for investments that the Host State considers would be ultimately unsuccessful. Similarly, international law requires Peru to make full

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[125] For example, by accusing the company of illegality, and by trying to introduce a *poncho* to the record during the hearing and insisting that somehow said *poncho* proves the company acted wrongfully. *See* Respondent's First PHB, ¶¶ 7-8.

[126] Respondent's First PHB, ¶ 100.

[127] **C-1**, Chapter Eight of the Free Trade Agreement between Canada and the Republic of Peru signed May 29, 2008 and entered into force on August 1, 2009, Art. 812(2) ("Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation"), except . . . on prompt, adequate and effective compensation. Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('date of expropriation'), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value").

reparation for injury caused by an unlawful act, including unlawful expropriation.[128] Bear Creek has easily satisfied its burden of proving (i) that Peru expropriated Bear Creek's investment or otherwise caused it harm by breaching other FTA provisions, (ii) the FMV of that investment, and (iii) any additional damages that are the consequence of that unlawful conduct.

49. Even if it could be said that there was a "lack of social license" at the time Supreme Decree 032 was issued, this does not mean that the Santa Ana Project would have been unsuccessful. As in any mining project, there is always the possibility that local opposition may delay or prevent the full development of a project, and the hypothetical purchaser in a FMV transaction would take this into account. Bear Creek has never advocated ignoring that possibility, either on its management team[129] or before this Tribunal. But Peru's unlawful conduct prevented the natural progression of the Santa Ana Project. To the extent the "social license" did not exist at the time of the taking (which Bear Creek disputes),[130] Bear Creek or a hypothetical purchaser of Santa Ana nonetheless could have obtained the "social license" had it been provided an opportunity to invest more time and money to do so. Peru, however, deprived Bear Creek or any hypothetical purchaser of that possibility, and both the FTA and international law require Peru to pay compensation for that conduct.

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[128] **CL-144**, James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 225 (2002) (stating that "[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the 'fair market value' of the property lost."); **CL-205**, *Case Concerning The Factory at Chorzów (Germany v. Poland)*, Judgment, Sept. 13, 1928 P.C.I.J. (Ser. A) No. 17, ¶ 47 ("*Chorzów No. 17* Decision"); s*ee, also*, Claimant's Memorial on the Merits, May 29, 2015, ¶¶ 195-213 ("Claimant's Memorial").

[129] **Tr.** 757:3-15 (McLeod-Seltzer) (stating that "social license is a journey, not a destination. And I've been involved for over 20 years in many mining projects, and it is very rare that you don't have some miscommunication that gets out of hand or, you know, somebody thinks, you know, that you're putting mercury into the ground when you're not. So, that wasn't alarming at all because, as I said, these bumps happen along the way. I mean, social license is not a bright line stasis situation. You're always communicating and trying to be transparent and gain that social license. So, that wasn't alarming. It wasn't good, but it wasn't alarming.")

[130] *See supra* ¶¶ 38-42.

1. The DCF Method is Appropriate to Determine the FMV of the Santa Ana Project

50. Peru continues to represent to this Tribunal that there exists a black-letter rule in international law that would prevent the use of the DCF method just because the Santa Ana Project was not in production at the time Supreme Decree 032 was issued. Peru is wrong. Investment arbitration tribunals including *Gold Reserve*,[131] *Quiborax*,[132] *Al-Bahloul*,[133] and *Vivendi II*[134] have acknowledged that, just as Bear Creek argues, the DCF method can be a reliable estimate of FMV even in the absence of a fully-operational business. In fact, the DCF method is the preferred valuation method when dealing with mineral properties, even in the development stage.[135]

51. The analysis of the *Gold Reserve* tribunal is particularly enlightening in this regard. There, the tribunal applied the DCF method, preferring it over comparable transactions, even though the project at issue had not yet reached production. The tribunal explained that, even though the project at issue never had "a functioning mine and therefore did not have a history of cashflow which would lend itself to the DCF model,"[136] the DCF method was the "preferred method of valuation" because "sufficient data [was] available."[137] The tribunal also

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131 **CL-63**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 ("*Gold Reserve* Award"), ¶¶ 830-831.

132 **CL-184**, *Quiborax S.A. et al. v. Bolivia*, ICSID Case No. ARB/06/2, Award, Sept. 16, 2015, ¶¶ 343-347.

133 **RLA-61**, *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V054/2008, Final Award, Jun. 8, 2010, ¶¶ 74-75.

134 **CL-38**, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 ("*Vivendi II* Award"), ¶¶ 8.3.4, 8.3.8, 8.3.10.

135 **BR-57**, Canadian Standards and Guidelines for Valuation of Mineral Properties –An Update, Oct. 18, 2011, Table 2 (stating that DCF is "the preferred method" to value properties). Moreover, contrary to Peru's alternative proposal for an award of Bear Creek's sunk costs to develop Santa Ana, CIMVal expressly rejects a cost-based valuation for development properties. *See* **FTI-04**, CIMVAL, Standards and Guidelines (Final Version), Feb. 2003, Table 1.

136 **CL-63**, *Gold Reserve* Award, ¶¶ 830, 831.

137 *Id.* (explaining, *inter alia*, that the investment at issue concerned "a commodity product for which data such as reserves and price are easily calculated" which "mitigate[d] against introducing other [valuation] methods").

noted that its "conclusion [was] supported by the CIMVal Guidelines."[138]

52. Here, the Tribunal has before it sufficient data to prefer the DCF model over any other valuation method. Like *Gold Reserve*, Bear Creek's case also deals with a commodity product for which data such as reserves and price are easily calculated. The Tribunal has at its disposal a DCF model with information that includes: (i) mining costs, (ii) processing costs; (iii) silver recovery; (iv) reserve silver prices; (v) mine dilution, (vi) mine extraction, (vii) cut-off grade, and (viii) permitting, construction and ramp-up schedule.[139] Thus, the Tribunal can determine with sufficient detail and accuracy what Bear Creek's cash flows would have been, "but for" Peru's unlawful action. Peru is simply wrong when it states that the DCF method cannot be applied in this case.

2. The DCF Valuation Submitted by Bear Creek is Reasonable and Appropriately Accounts for Risks

53. As Bear Creek explained in its PHB,[140] FTI's DCF valuation properly adjusts for risks inherent to the mining industry generally and to a mining project in Peru such as Santa Ana. Peru's argument that a "social license risk" of 27% or 80% should be imposed on Santa Ana's valuation is an argument tailor-made for this arbitration and an attempt to undervalue Santa Ana. Again, social opposition is inherent to any mining project but such opposition is a risk that mining companies can overcome through execution of a community relations program.

54. FTI calculated Santa Ana's FMV to be US$ 224.2 million.[141] The Tribunal can

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138 *Id.*, ¶ 831.

139 *See, e.g.*, RPA Direct Presentation, Sept. 13, 2016, Slide 17; **Tr**. 1438:18-1443:7 (RPA); **Exhibit C-61**, Ausenco Vector, Revised Feasibility Study – Santa Ana Project - Puno, Peru, NI 43-101 Technical Report, Update to the Oct. 21, 2010 Technical Report, Apr. 1, 2011, at § 1.11; **Tr**. 1607:10-15 (FTI) (explaining that silver price is not controversial between the parties because if FTI "tease[s] out the price that Brattle has used and put it in our model, then we actually get a higher value because their prices are higher in the short to medium term").

140 Claimant's First PHB, ¶¶ 80, 85; **Tr.** 1822:2-1823:19 (Claimant's Closing Statement).

141 *See* Reply Report of FTI Consulting, Inc., Jan. 8, 2016, Figure 1.

test the reasonableness of that valuation by cross-referencing *seven* contemporaneous independent valuations made by market analysts outside the arbitration context.[142] This is the approach that the *Gold Reserve* tribunal adopted.[143] That tribunal dismissed criticism of the market analysts, stating that "to suggest that all of these independent valuations are worthless is simply not credible."[144] Similarly here, to suggest that the seven contemporaneous valuations of Santa Ana have zero value (as Peru posits) is simply not credible.

55. The *Gold Reserve* tribunal also considered relevant the fact that the claimant had detailed feasibility studies and had secured financing for the Project.[145] Similarly, when Peru enacted Supreme Decree 032, Bear Creek had completed pre-feasibility and definitive feasibility studies and had obtained US$ 130 million in financing for construction of the mine. It should be readily apparent to the Tribunal that if a 27% or 80% "social license risk" were truly justified, then such risk should have been reflected in this contemporaneous evidence. The fact that it is wholly absent demonstrates that the "social license risk" is nothing more than a *post-hoc* gambit by Peru to reduce damages illegitimately.

56. In any event, if the Tribunal were to find that any further reduction in value is justified, then FTI's valuation model provides the Tribunal with the ability to do so. As explained in Bear Creek's PHB, the Tribunal can adjust the cost and startup-date inputs to account for any further time and money investments Bear Creek (or a hypothetical purchaser)

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142 FTI Expert Report, May 29, 2015, Figure 25 ¶¶ 7.82-7.83; **FTI-53**, BMO capital Markets Analyst Report, June 1, 2011; **FTI-54**, Raymond James Analyst Report, June 2, 2011; **FTI-55**, Paradigm Capital Analyst Report, June 8, 2011; **FTI-56**, Campbell, Nicholas, Canaccord Genuity Analyst Report, June 7, 2011; **FTI-57**, Scotia Capital Analyst Report, May 31, 2011; **FTI-58,** Haywood Securities Analyst Report, March 17, 2011; **FTI-59,** Cormark Securities Analyst Report, June 24, 2011.

143 **CL-63**, *Gold Reserve* Award, ¶¶ 832-833.

144 *Id.*, ¶ 833.

145 *Id.*, ¶¶ 832-833.

would have needed to secure the social license following the protests in Southern Puno.[146]

3. Peru's Requests that the Tribunal Only Award Amounts Invested Should be Disregarded as Inconsistent with the FTA

57. Peru wrongly asserts that "the only other damages calculation the Parties have offered" is amounts invested.[147] This approach contradicts the FTA and industry valuation guidelines.[148] Awarding compensation equivalent to amounts invested—which Peru's own expert acknowledges is a concept distinct from FMV[149]—would require the Tribunal to ignore the plain text of the FTA and the evidence in this arbitration.

58. More importantly, other valuations in the record demonstrate the reasonableness of FTI's valuation. Contrary to its suggestion, Peru itself submitted alternative, albeit flawed, market-based valuations: a share-price analysis and its own version of the "modern" DCF method.[150] Additionally, the Tribunal has at its disposal contemporaneous valuations prepared outside the context of litigation,[151] which highlight that amounts invested would not properly reflect Santa Ana's FMV.[152]

B. COMPENSATION FOR NON-EXPROPRIATION BREACHES OF THE FTA

59. The Parties should agree that since the FTA is silent as to the standard of compensation for non-expropriation breaches of the FTA, customary international law applies,

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146 Claimant's First PHB, ¶¶ 105-106.

147 Respondent's First PHB, ¶ 106.

148 Claimant's First PHB, ¶ 81; Claimant's Reply, ¶¶ 418-423.

149 **REX-10**, Second Expert Valuation Report of Prof. Graham Davis/Brattle Group, Apr. 13, 2016, ¶¶ 21, 31, 32.

150 Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, Oct. 6, 2015, ¶¶ 356-366 (stating that "[a]lthough the market-based valuation methodology is itself imperfect . . . if the Tribunal is compelled to award damages for Santa Ana beyond amounts invested [then] Brattle's market-based valuation would be a viable option"); Peru's Rejoinder on the Merits and Reply on Jurisdiction, ¶¶ 617-629, 641.

151 *See* FTI Expert Report, May 29, 2015, Figure 25 ¶¶ 7.82-7.83. *See also* **REX-4**, Expert Valuation Report of Prof. Graham Davis and the Brattle Group, Oct. 6, 2015, Appendix A at A-8 (referencing the seven independent valuations as a "material" on which Brattle relied).

152 FTI's Direct Presentation, Sept. 13, 2016, Slide 16.

providing a standard of "full reparation" to "wipe out" all consequences of the unlawful act.[153] Peru, however, asserts that damages for fair and equitable treatment violations are non-existent because, even if Bear Creek had been given an opportunity to be heard, "nothing it could have said would have altered the grounds upon which the revocation occurred" since these grounds turned out to be true.[154] Peru is wrong as a matter of fact and law.

60. The evidence in the record demonstrates that: (i) Bear Creek did not violate Peruvian law;[155] and (ii) even if Bear Creek had, Peru would have excused this violation.[156] Thus, had Claimant been afforded an opportunity to address this accusation, it would have been able to defend itself and bypass it.

61. Moreover, a State is not permitted to violate international law with impunity simply because it ultimately ends up being right about the reasons that underlie said violation. This elemental concept was first enforced by the *Amco* tribunal and confirmed by the *Rumeli* tribunal: a State action that lacks due process engages the State's international liability, irrespective of whether the measure may have been justified on the merits.[157]

C. CONTRIBUTORY FAULT

62. In its First PHB, Peru dedicated two paragraphs to advance a completely new theory of causation it had not advanced before and only did so after being prompted by a question from the Tribunal: contributory fault.[158] Yet, in its response, Peru failed to address the standard and requirements for the theory to apply. This is no casual omission. A detailed

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153 Claimant's First PHB, ¶ 92; **CL-205**, *Chorzów* No. 17 Decision p. 47; s*ee also* Claimant's Memorial, ¶¶ 223-231.

154 Respondent's First PHB, ¶ 112

155 Second Bullard Expert Report ¶ 62; **Exhibit C-6**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014; Claimant's Reply, ¶¶ 192-200.

156 *See* Claimant's First PHB, ¶¶ 69-70, § III C.

157 **CL-137**, *Amco I* Award, ¶¶ 198-199, 202-203; **CL-78**, *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Award, Jul. 29, 2008, ¶¶ 615-619.

158 Respondent's First PHB, ¶¶ 114-115.

analysis of the theory amply demonstrates that, as the First Constitutional Court in Lima held, Bear Creek did not contribute to the harm it suffered.[159] As explained in Bear Creek's PHB, and as supported by international law, this theory requires that a respondent prove that a claimant engaged in willful or negligent conduct (or omission) that materially and significantly contributed to its harm, directly causing it.[160] There is no such evidence here.

V. REQUEST FOR RELIEF

63. For the reasons stated herein, Claimant, Bear Creek, reiterates its request for relief as stated in its Post-Hearing Brief of December 21, 2016.[161]

February 15, 2017

Respectfully submitted,

KING & SPALDING LLP
MIRANDA & AMADO

[159] **Exhibit C-6**, Amparo Decision No. 28 issued by the Lima First Constitutional Court, May 12, 2014, pp. 20-21.
[160] Claimant's First PHB, ¶¶ 93-106.
[161] *See* Claimant's First PHB, ¶ 109.